Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
	)	
Establishing Just and Reasonable Rates for Local Exchange Carriers	)	WC Docket No. 07-135
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
	)	
Developing an Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
Lifeline and Link-Up	)	WC Docket No. 03-109

REPLY COMMENTS OF CELLULAR SOUTH, INC.

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SUMMARY

The proponents of a broadband-centric Connect America Fund have failed to come up with a plausible legal theory to buttress the Commission tentative conclusion that it has the statutory authority to extend Universal Service Fund ("USF") support to broadband information services providers that are ineligible to receive such support under §§ 214(e)(1) and 254(e) of the Communications Act of 1934, as amended ("Act").

Information service providers are exempt from mandatory common-carrier regulation under Title II of the Act. Because it is without authority to regulate broadband information services under Title II, the Commission cannot assert that it has the authority to extend support from the Title II USF to broadband services offered as information services. If information services providers receive USF support, they would be subject to the Commission's Part 54 universal service rules, which are the Title II *regulations* that the Commission has adopted, or will adopt, under its express statutory authority to implement §§ 214(e) and 254 of the Act. However, information services providers are not subject to any Title II regulations.

Parties that provide broadband information services use the ambiguity in the non-jurisdiction-conferring language of § 254(b) as their springboard to claim that the Commission's assertion of Title II jurisdiction over information service providers will garner *Chevron* deference from a reviewing court. However, the familiar two-step *Chevron* analysis does not apply when the issue before the court is whether the Commission has been expressly delegated the authority by Congress to extend USF support to information services providers that are statutorily ineligible to receive that support.

In any event, there is no ambiguity in the mandatory language of § 214(e)(1), which provides, "A *common carrier* designated as an eligible *telecommunications carrier* ["ETC"] … *shall* be eligible to receive universal service support in accordance with section 254 of [the Act]." Nor is there any ambiguity in § 254(e), which mandates that "*only* an eligible *telecommunications carrier* designated under section 214(e) … *shall* be eligible to receive specific [USF] support." Since §§ 214(e)(1) and 254(e) are explicitly linked by § 254(e)'s reference to § 214(e), the two provision are *in pari material* and must be construed together to mean exactly what they plainly state: only telecommunications carriers or common carriers that have been designated as eligible to receive USF support can receive USF support.

Examination of the structure of the Telecommunications Act of 1996 ("1996 Act"), which enacted § 706 (now 47 U.S.C. § 1392) and added §§ 214(e) and 254 to the Act, reveals the intent of Congress. New §§ 214(e) and 254 were added to the Act by Subtitle A of Title I of the 1996 Act. The heading for both Title I and Subtitle A was "Telecommunications Services," which should be considered in construing §§ 214(e) and 254(e). The placement of the universal service provisions in the heart of Subtitle A of the 1996 Act — to be codified in Parts I and II of the common carrier subchapter of the Act — indicates that Congress intended that regulated telecommunications carriers be the only recipients of USF support.

The provisions of §§ 1 and 4(i) of the Act are also *in pari materia.* There is no ambiguity in the language of § 1 which provides that the Commission "*shall* execute and enforce the provisions of [the Act]." Under the heading "Duties and powers," § 4(i) provides that "[t]he Commission may … make such rules and regulations, and issue such orders, not inconsistent with [the Act], as may be necessary in the execution of its functions." Construing §§ 1 and 4(i) together, it is clear that the Commission's *power* to adopt rules and regulations under Title I is

limited to those that are necessary to fulfill its *duty* under § 1 to carry out, and compel obedience to, the provisions of the Act, including §§ 214(e)(1) and 254(e). That means that the Commission cannot adopt rules that would permit ineligible information service providers to receive USF support in violation of §§ 214(e)(1) and 254(e).

If it carries out its proposal to forbear from requiring that recipients of universal service support be designated as ETCs at all, the Commission will dismantle the dual federal-state regulatory scheme that Congress designed for universal service in the 1996 Act. Since it lacks the power to enforce § 214(e) against a state commission, the Commission cannot exercise its § 10 forbearance authority to prevent state commissions from exercising their authority under § 214(e)(2) to designate common carriers as ETCs. And the Commission has no authority to prevent state commissions from obeying the mandate that they designate only telecommunications carriers to be eligible to receive USF support.

If the information services providers that the Commission favors are to be exempt from all Title II regulations, they cannot be eligible to receive USF support that is available under Title II regulations. If it wants to give information services providers the best of both regulatory worlds, the Commission must ask Congress to overhaul its universal service program. The Commission is powerless to do that on its own.

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To: The Commission

REPLY COMMENTS OF CELLULAR SOUTH, INC.

Cellular South, Inc. ("Cellular South"), by its attorney, hereby submits its reply to the comments filed with respect to the Commission's legal theories propounded in § IV of its Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking in the above-captioned proceeding to buttress its authority under the Communications Act of 1934, as amended ("Act"), to provide universal service support for the deployment of broadband services.[1]

INTRODUCTION

If the Commission's authority under §§ 214(e) and 254 of the Communications Act of 1934, as amended ("Act"), to extend Universal Service Fund ("USF") support to broadband

[1] *See Connect America Fund*, FCC 11-13, at 29 (¶ 74) (Feb. 9, 2011) ("*Notice*").

information service providers could be determined by popular vote in this proceeding, the vote count would be reminiscent of the 2000 presidential election. If all of the comments that addressed the issue are counted, including those that did so cursorily or ambiguously, the race would be too close to call and the outcome debatable.[2] However, if only the comments of the parties who actually examined the statutory language are counted, the vote would leave the Commission without jurisdiction. Only AT&T Inc. ("AT&T"), whose "white paper" on jurisdiction was adopted by the Commission, attempted to construct a legal theory under which the agency could misappropriate universal service funds to benefit information services providers.[3] And that attempt was entirely unpersuasive.

But the issue of whether the Commission has the authority to extend USF support to broadband information service providers that are ineligible to receive support has already been decided by the vote of Congress in 1996. We will show that the result of that vote is clearly stated in §§ 214(e)(1) and 254(e) of the Act, which plainly provide that only telecommunications carriers or common carriers that have been designated as eligible to receive USF support can receive USF support. *See* 47 U.S.C. §§ 214(e)(1), 254(e). The Commission clearly wishes it to be otherwise. But the Commission must get Congress to vote on the issue again if it persists in wanting to disburse funds from the Title II universal service program to support broadband information services providers that are not subject to Title II regulations.

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[2] *See infra* Attachment 1.

[3] *Compare* Comments of AT&T, at 111-20 (Apr. 18, 2011) ("AT&T") *with* Comments of Cellular South, Inc., at 6-33 (Apr. 18, 2011) ("Cellular South"); Initial Comments of the National Ass'n of Regulatory Utility Commissioners, at 3-8 (Apr. 18, 2011); Comments of the National Ass'n of State Utility Consumer Advocates, at 27-35 (Apr. 18, 2011); Comments of the National Exchange Carrier Ass'n, Inc., National Telecommunications Cooperative Ass'n., Organization for the Promotion and Advancement of Small Telecommunication Companies, and Western Telecommunications Alliance, at 81-82 (Apr. 18, 2011); Comments of COMPTEL, at 26-30 (Apr. 18, 2011); and Comments of the Rural Telecommunications Carriers Coalition, at 6-19 (Apr. 18, 2011).

ARGUMENT

I. THE COMMISSION CANNOT EXTEND USF SUPPORT TO INFORMATION SERVICES PROVIDERS BECAUSE IT LACKS AUTHORITY TO REGULATE SUCH PROVIDERS UNDER TITLE II OF THE ACT

Remarkably, the Commission has yet to formally adopt a definition of the term "broadband services."[4] We will proceed under the assumption that the term essentially means "broadband Internet access services"[5] or "high-speed Internet access services."[6] We begin by tracing the Commission's classification of the various broadband services as "information services" under the Act.[7]

By § 509 of the Communications Decency Act of 1996, Congress amended Title II of the Act by adding new § 230 entitled "Protection for private blocking and screening of offensive material." 47 U.S.C. § 230. Section 230 states the congressional findings that the Internet and other interactive computer services "represent an extraordinary advance in the availability of

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[4] The Act does not contain a definition of the term "broadband," and we have been unable to find a Commission-adopted definition of the term in any published Commission decision. At the most, the Commission has used the term "broadband" synonymously with "advanced telecommunications capability" for the purposes of § 706, but it has emphasized that its use of the terms will not have any other "regulatory significance" absent subsequent Commission action. *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to § 706 of the 1996 Act, as Amended by the Broadband Data Improvement Act*, 25 FCC Rcd 11355, 11356 n.2 (2010).

[5] In *Preserving the Open Internet*, 25 FCC Rcd 17905 (2010), the Commission began regulating the Internet for the first time by the promulgation of Part 8 of its rules. New § 8.11(a) of the rules defines the term "broadband Internet access services" as follows:

> A mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service. This term also encompasses any service that the Commission finds to be providing a functional equivalent of the service described in the previous sentence, or that is used to evade the protections set forth in this Part [8].

Preserving the Open Internet, 25 FCC Rcd at 17932.

[6] It appears that the term "broadband" simply means high-speed Internet access to the Commission. *See* Julius Genachowski, Prepared Remarks at the "Generation Mobile" Forum at McKinley Technology High School, Washington, D.C. (Dec. 14, 2010), *reprinted in*, 2010 WL 5113160 at *1.

[7] *See* 47 U.S.C. § 153(20).

educational and informational resources," *id.* § 230(a)(1), and "have flourished … with a minimum of government regulation." *Id.* § 230(a)(4). It also expressly states the congressional policies "to promote the continued development of the Internet and other interactive computer services and other interactive media," *id.* § 230(b)(1), and "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services unfettered by Federal or State regulation." *Id.* § 230(b)(2).

As the Commission has acknowledged, § 230 does not delegate any regulatory authority.[8] Nevertheless, guided by the congressional Internet policies, the Commission has repeatedly determined that broadband services should exist in a "minimal regulatory environment" that promotes investment and innovation in a competitive market.[9] Thus, it has classified "cable modem" broadband,[10] wireline broadband,[11] wireless broadband,[12] and broadband over power line services[13] as information services.

Broadband Internet access services provided as information services are "exempt from mandatory common-carrier regulation under Title II." *Brand X*, 545 U.S. at 973. *See Time*

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[8] *See Comcast Corp. v. FCC*, 600 F.3d 642, 652 (D.C. Cir. 2010).

[9] *E.g., Inquiry Concerning High-Speed Access to Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798, 4802 (2002) ("*Cable Broadband Order*"), *aff'd in part, vacated in part, Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003), *rev'd sub nom., National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005). *See Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to § 706 of the 1996 Act, as Amended by the Broadband Data Improvement Act*, 14 FCC Rcd 2398, 2405 (1999) ("In no respect are we considering regulating the Internet").

[10] *See Cable Broadband Order*, 17 FCC Rcd at 4825, 4828-31.

[11] *See Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853, 14857, 14862-65 (2005) ("*Wireline Broadband Order*"), *petition for review denied, Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007).

[12] *See Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, 22 FCC Rcd 5901, 5901, 5908-14 (2007).

[13] *See United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband Over Power Line Internet Access Service as an Information Service*, 21 FCC Rcd 13281, 13281, 13285-89 (2006).

Warner, 507 F.3d at 213 ("Only telecommunications service is subject to mandatory regulation under Title II"). Consequently, as is the case with cable broadband service, the Commission is without authority to regulate broadband Internet access service under Title II, when it is offered as an information service.[14] That being the case, the Commission cannot assert that it has the authority to extend support from the Title II USF to broadband services offered as information services. Obviously, if information services providers receive USF support, they would be subject to the Commission's Part 54 universal service rules, which are the Title II *regulations* that the Commission has adopted, or will adopt, under its express statutory authority to implement §§ 214(e) and 254 of the Act. *See* 47 U.S.C. § 254(a).

II. THE COMMISSION WILL RECEIVE NO *CHEVRON* DEFERENCE IF IT CLAIMS THAT IT HAS THE AUTHORITY TO EXTEND USF SUPPORT TO INFORMATION SERVICES PROVIDERS

The proponents of a "broadband-centric" Connect America Fund[15] latch on to the purported ambiguities in § 254 of the Act as authorizing the Commission to direct universal service support to broadband services offered as information services.[16] They use the ambiguity in the non-jurisdiction-conferring language of § 254(b)[17] as their springboard to claiming that the Commission's assertion of Title II jurisdiction over information service providers will garner *Chevron* deference from a reviewing court.[18] Their obvious strategy is to encourage the

[14] Having ruled that cable Internet access service was not a telecommunications service, the Commission did not claim in *Comcast* that Congress had given it express authority to regulate that broadband service. *See* 600 F.3d at 645. It claimed only that it had Title I ancillary authority to regulate cable broadband service. *See id.* The Court rejected that claim. *See id.* at 661.

[15] Comments of Google, Inc., at 13 (Apr. 18, 2011) ("Google").

[16] *See* AT&T at 114-15; Comments of the Telecommunications Industry Association, at 6-7 (Apr. 18, 2011) ("TIA"); Comments of Vonage Holdings Corp., at 8-9 (Apr. 18, 2011) ("Vonage").

[17] The alleged ambiguity emanates from the universal service principles enumerated in § 254(b). *See* AT&T at 112; TIA at 6-7. As Cellular South established, § 254(b) does not contain a delegation of regulatory authority. *See* Cellular South at 14-16.

[18] *Chevron, USA v. NRDC,* 467 U.S. 837 (1984).

Commission to employ statutory construction to assert Title II jurisdiction over information services providers. However, the familiar two-step *Chevron* analysis applies when a court reviews "an agency's construction of the statute which it administers."[19] It does not apply when the issue before the court is whether the Commission has been expressly delegated the authority by Congress.[20]

If the Commission goes forward with its proposal, it will be the first time that the Commission will apply Title II common-carrier regulations to information services providers. And it will do so in spite of the clear import of *Brand X*, *Time Warner* and *Comcast.*[21] Under the circumstances, and contrary to AT&T's contention,[22] the Commission will receive no *Chevron* deference from a reviewing court on the issue of whether it has the statutory authority to extend USF support to information services providers. *See Motion Picture Ass'n of America, Inc. v. FCC,* 309 F.3d 796, 801 (D.C. Cir. 2002) (an "agency's interpretation of [a] statute is not entitled to deference absent a *delegation of authority* from Congress to regulate in the areas at issue" (emphasis in original)); *American Library Ass'n v. FCC*, 406 F.3d 689, 699 (D.C. Cir. 2005)

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[19] *Chevron*, 467 U.S. at 842. Under *Chevron* step one, a court must determine "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id*. at 842-43. In making that determination, a court will employ "traditional tools of statutory construction." *Id.* at 843 n.9. If Congress "has not directly addressed the precise question" at issue, and the agency has acted pursuant to an express delegation of authority, the agency's interpretation of the statute is entitled to deference under *Chevron* step two, so long as it is "reasonable" and not otherwise "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 843-44.

[20] "'[I]f the statute is silent or ambiguous with respect to the specific' issue presented," the court must ask under *Chevron* step two "whether the agency's interpretation 'is based on a permissible construction is reasonable.'" *Time Warner,* 507 F.3d at 215 n.9 (quoting *Chevron,* 467 U.S. at 843). However, *Chevron* step two deference is not due "[w]hen an agency's assertion of power into new areas is under attack." *American Civil Liberties Union v. FCC*, 823 F.2d 1554, 1567 n.32 (D.C. Cir. 1987) ("*ACLU*"), *cert. denied,* 485 U.S. 959 (1988). In such a case, "Congress can reasonably be expected both to have and to express a clear intent," because "it seems highly unlikely that a responsible Congress would implicitly delegate to an agency the power to define the scope of its own power." *Id*.

[21] *See Preserving the Open Internet*, 25 FCC Rcd at 18067-68 (Comm'r McDowell, dissenting).

[22] *See* AT&T at 114 n.231.

(same). *See also Gonzales v. Oregon,* 546 U.S. 243, 255-56 (2006) (*Chevron* deference "is warranted only 'when it appears … that the agency interpretation claiming deference was promulgated in the exercise of [delegated] authority'" (quoting *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001)). In any event, there is no statutory ambiguity with respect to the Commission's duty to abide by the mandatory language of the jurisdiction-conferring provisions of §§ 1, 214 and 254 of the Act.

III. SECTIONS 214(e)(1) AND 254(e) UNAMBIGUOUSLY PROVIDE THAT ONLY TELECOMMUNICATIONS CARRIERS ARE ELIGIBLE TO RECEIVE UNIVERSAL SERVICE SUPPORT

"[I]t is beyond cavil that the first step in any statutory construction, and [the] primary interpretive tool, is the language of the statute itself." *ACLU,* 823 F.2d at 1568. Turning to the language of the Act, we find that §§ 214(e)(1) and 254(e) speak with "crystalline clarity" on the precise issue of whether USF support can be extended to information services providers. *Id.*

There is no ambiguity in the mandatory language of § 214(e)(1) of the Act, which provides, "A *common carrier* designated as an eligible *telecommunications carrier* ["ETC"] … *shall* be eligible to receive universal service support in accordance with section 254 of [the Act]."[23] The word "eligible" means "fit or proper to be chosen" or "meeting the stipulated requirements, as to participate, compete, or work; qualified."[24] The meaning of the terms "common carrier" and "telecommunications carrier" are clear, since they are defined in § 3 of the Act and are treated as synonymous.[25] The latter term is defined as "any provider of

[23] 47 U.S.C. § 214(e)(1) (emphasis added). By employing the word "shall," Congress made it mandatory that a common carrier designated as an eligible telecommunications carrier be eligible to receive USF support in accordance with § 254. *See* Cellular South at 25-26.

[24] Random House Webster's Unabridged Dictionary 632 (2d ed. 2001). In law, the word "eligible" means "[f]it and proper to be chosen" or "[c]apable of being chosen." Black's Law Dictionary 521 (6th ed. 1990). The Commission understands that the word "eligible" means "qualified to participate or be chosen." *Notice* at 92 (¶ 264).

[25] *See* Cellular South at 12 & n.46.

telecommunications services."[26] The statutory definition includes the proviso that "[a] telecommunications carrier shall be treated as a common carrier under [the Act] only to the extent that it is engaged in providing telecommunications services."[27] Thus, § 214(e)(1) plainly mandates that telecommunications carriers are to be designated as meeting the requirements to receive universal service support under § 254 only to the extent that they are engaged in providing telecommunications services.

Subsection 254(e) is equally unambiguous. It explicitly mandates that "*only* an eligible *telecommunications carrier* designated under section 214(e) … *shall* be eligible to receive specific Federal universal service support."[28] The word "only" means "without others or anything further; alone; solely; exclusively."[29] Thus, the plain meaning of § 254(e) is that telecommunications carriers and no others meet the requirements to receive universal service support.

AT&T claims that the "tension" between the principles set forth in § 254(b) and the plain language of § 254(e), as well as selected language of §§ 254(c) and 254(h), creates "ambiguity about the scope of [§] 254," which would allow a reviewing court to defer to the Commission's interpretation under *Chevron* step two.[30] However, under the canons of statutory construction, the plain meaning of § 254(e) cannot be obscured by any unrelated ambiguity elsewhere in § 254.

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[26] 47 U.S.C. § 153(44).

[27] *Id.*

[28] *Id.* § 254(e) (emphasis added).

[29] Random House at 1354. The legal definition of "only" is "[s]olely; merely; for no other purpose; at no other time; in no otherwise; along; of or by itself; without anything more; exclusive; nothing else or more." Black's at 1089.

[30] AT&T at 113-14. Under *Chevron* step two, a court must defer to the Commission's reasonable interpretation of an ambiguous provision of the Act. *See* 467 U.S. at 844.

In the first place, "[s]tatutory provisions *in pari materia* normally are construed together to discern their meaning." *Motion Picture Ass'n*, 309 F.3d at 801. Therefore, § 254(e) must be construed together with § 201(e)(1), particularly since the two provisions are expressly linked by § 254(e)'s reference to § 214(e). Since there is nothing ambiguous in § 214(e)(1) that would permit the Commission to depart from its plain meaning, § 254(e) cannot be interpreted to authorize the Commission to make an information services provider — *that cannot be designated as an ETC under § 214(e)* — eligible to receive USF support. The unambiguous language of § 254(e) cannot be construed as inconsistent with § 214(e)(1) when the "rules of statutory construction require that we give meaning to all statutory provisions and seek an interpretation that permits us to read them with consistency." *Barnes v. Holder*, 625 F.3d 801, 806 (4th Cir. 2010) (quoting *United States v. Fisher*, 58 F.3d 96, 99 (4th Cir. 1995)). Hence, §§ 214(e)(1) and 254(e) must be read together to mean exactly what they plainly state: only telecommunications carriers or common carriers that have been designated as eligible to receive USF support can receive USF support.

IV. THE PROVISION OF USF SUPPORT TO INFORMATION SERVICES PROVIDERS WOULD FLOUT THE INTENT OF CONGRESS IN ENACTING TITLE I OF THE 1996 ACT

AT&T's construction of the Act is built upon snippets excerpted from §§ 4 and 254 of the Act, as well as § 706 of the Telecommunications Act of 1996 ("1996 Act").[31] AT&T's approach is wholly inconsistent with the rules of statutory construction. Foremost among these is the principle that statutory construction "is a holistic endeavor," *United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 215, 221 (1988), and "at a minimum, must account for a statute's full text, language as well as punctuation, structure, and subject matter."

[31] *See* AT&T at 111-20.

United States National Bank of Oregon v. Independent Insurance Agents of America, Inc., 508 U.S. 439, 455 (1993). *See National Cable Television Ass'n v. FCC*, 33 F.3d 66, 75 (D.C. Cir. 1994). And the statute that must examined first in this instance is the 1996 Act, which enacted § 706 (now 47 U.S.C. § 1392) and added §§ 214(e) and 254 to the Act.

Examination of the structure of the 1996 Act clearly shows that Congress intended that the USF support telecommunications services provided by regulated common carriers. To begin with, Congress added §§ 214(e) and 254 to the Act under Subtitle A of Title I of the 1996 Act.[32] The heading for both Title I and Subtitle A was "Telecommunications Services,"[33] which should be considered in conjunction with its text to come up with its purpose and meaning.[34]

Subtitle A of the 1996 Act added two new parts to Title II ("Subchapter II—Common Carriers"). Congress inserted the new heading "Part 1—Common Carrier Regulation" before the heading for § 201.[35] The new Part 1 included § 214, which Congress amended by adding subsection (e) under the heading "Provision of universal service."[36] Under the heading "Eligible telecommunications carriers,"[37] § 214(e)(1) provides, as we have discussed, that a common carrier designated as an ETC is eligible to receive USF support in accordance with § 254. *See supra* pp 6-7.

Congress also amended Title II by inserting the heading "Part II—Development of Competitive Markets" after § 229 of the Act.[38] All eleven sections of Part II, including § 254,

[32] *See* H.R. Rep. No. 104-458, at 2, 7 (1996) ("Conference Report").
[33] *Id.*
[34] *See Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 441 & n.89 (5th Cir. 1999).
[35] 1996 Act, § 101(b); Conference Report at 26.
[36] 1996 Act, § 102(a); Conference Report at 26.
[37] *Id.*
[38] *See* 1996 Act, § 101(a); Conference Report at 7.

are addressed to telecommunications carriers or the regulation of telecommunications carriers.[39] In addition to mandating that only an ETC designated under § 214(e) is eligible to receive USF support, *see supra* p. 7, § 254 defines "universal service" as "an evolving level of telecommunications services,"[40] and requires "[e]very telecommunications carrier that provides interstate telecommunications service" to contribute to the USF.[41]

The telecommunications services provisions of Subtitle A of the 1996 Act were intended to open all telecommunications markets to competition.[42] To achieve that goal, Congress placed rather onerous requirements on telecommunications carriers, especially incumbent local exchange carriers ("ILECs") or the "legacy monopoly carrier[s]."[43] Having imposed regulatory burdens on telecommunications carriers, including the obligation of ILECs to allow competitors to enter their local markets,[44] Congress balanced the score somewhat by making the regulated telecommunications carriers eligible to receive the benefit of USF support under §§ 214(e) and 254. Thus, the placement of the universal service provisions of 214(e) and 254 in the heart of Subtitle A of the 1996 Act — to be codified in Parts I and II of the common carrier subchapter of the Act — indicates that Congress intended that regulated telecommunications carriers be the only recipients of USF support.

The Commission would forsake the structure of the Act, and literally flout the intent of Congress, if it diverted funds from the Title II universal service program to support information services providers that are not subject to Title II regulation. In the process, the Commission

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[39] *See* 47 U.S.C. §§ 251-261.

[40] *Id.* § 254(c)(1).

[41] *Id.* § 254(d).

[42] *See, e.g., Sprint Telephony PCS, L.P. v. Pacific Bell Wireless LLC*, 543 F.3d 571, 575-76 (9th Cir. 2008).

[43] *Budget Prepay, Inc. v. AT&T Corp.*, 605 F.3d 273, 275 (5th Cir. 2010).

[44] *See, e.g., Verizon Communications Inc. v. FCC*, 533 U.S. 467, 491 (2002).

would "run roughshod over the compromise between interest groups that allowed the [1996 Act] to be passed in the first place." *Wisconsin Bell, Inc. v. Bie*, 340 F.3d 441, 445 (7th Cir. 2003).

V. THE COMMISSION HAS A MANDATORY STATUTORY DUTY TO EXECUTE AND ENFORCE THE PROVISIONS OF §§ 214(e) AND 254(e)

The Commission interprets § 1 of the Act as a source of its subject matter jurisdiction.[45] However, we read § 1 as also imposing a limitation on the Commission's authority, including its ancillary jurisdiction under Title I.

There is no ambiguity in the language of § 1 which provides that the Commission "*shall* execute and enforce the provisions of [the Act]."[46] The plain meaning of the word "execute" is "to carry out; accomplish" or "to perform or do."[47] The word "enforce" means "to put or keep in force; compel obedience to."[48] By employing the word "shall," Congress imposed a mandatory duty on the Commission to carry out, and compel obedience to, the clear provisions of §§ 214(e)(1) and 254(e).

The provisions of §§ 1 and 4(i) of the Act are also *in pari materia* and should be construed together. Under the heading "Duties and powers," § 4(i) provides in pertinent part that "[t]he Commission may … make such rules and regulations, and issue such orders, not inconsistent with [the Act], as may be necessary in the execution of its functions."[49] The word "execution" means "the act or process of executing."[50] Construing §§ 1 and 4(i) together, it is clear that the Commission's *power* to adopt rules and regulations under Title I is limited to those

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[45] *See, e.g., Preserving the Open Network,* 25 FCC Rcd at 17966-67.

[46] 47 U.S.C. § 151 (emphasis added).

[47] Random House at 676. In law, the word means "[t]o complete; to make; to sign; to perform; to do; to follow out; to carry out according to its terms; to fulfill the command or purpose of." Black's at 567.

[48] Random House at 644. The legal definition of "enforce" is "[t]o put into execution; to cause to take effect; to make effective; as, to enforce a particular law …; to compel obedience to." Black's at 528.

[49] 47 U.S.C. § 154(i).

[50] Random House at 676. The word also means "[c]arrying out some act or course of conduct to its completion." Black's at 568.

that are necessary to fulfill its *duty* under § 1 to carry out, and compel obedience to, the provisions of the Act. Hence, the Commission's ancillary rulemaking authority with the respect to the administration of the USF is limited to the adoption of rules that are necessary to carry out, and compel obedience to, §§ 214(e) and 254. That means that the Commission cannot adopt rules that would permit ineligible information service providers to receive USF support in violation of §§ 214(e)(1) and 254(e).

VI. THE COMMISSION IS WITHOUT AUTHORITY TO PREEMPT STATE COMMISSIONS FROM DESIGNATING AND REGULATING ETCS

In its zeal to provide USF support to broadband information services providers that are ineligible to be designated as ETCs, the Commission actually sought comment on "whether the Commission could or should forbear from requiring that recipients of universal service support be designated as ETCs at all."[51] Setting aside the issue of whether it can forbear from abiding by the mandatory language of § 214(e)(6),[52] the Commission obviously is without the power to prevent state commissions from exercising the authority that Congress expressly delegated to them to designate ETCs.[53] Indeed, if it carries out its proposal to provide USF support to broadband information services providers, the Commission will dismantle the dual federal-state regulatory scheme that Congress designed for universal service in 1996. *See AT&T Corp. v. Public Utility Comm'n of Texas,* 373 F.3d 641, 643 (5th Cir. 2004); *AT&T Communications of*

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[51] *Notice* at 35 (¶ 89).

[52] *See* 47 U.S.C. § 214(e)(6) ("In the case of a *common carrier providing telephone exchange service and exchange access* that is not subject to the jurisdiction of a State commission, the Commission *shall* upon request designate such a common carrier that meets the requirements of paragraph (1) as an [ETC] for a service area designated by the Commission consistent with applicable Federal and State law") (emphasis added).

[53] *See id.* § 214(e)("A State commission *shall* upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (1) as an [ETC] for a service area designated by the State Commission") (emphasis added).

the Southern States, Inc. v. BellSouth Telecommunications, Inc., 268 F.3d 1294, 1298 (11th Cir. 2001); *Qwest Corp. v. FCC*, 258 F.3d 1191, 1203 (10th Cir. 2001) ("*Qwest I*"). The dual federal-state regulatory scheme employed by the 1996 Act has been dubbed "cooperative federalism." *See BellSouth Telecommunications, Inc. v. Sanford*, 494 F.3d 439, 448 (4th Cir. 2007).

The dual federal-state regulatory scheme employed by the 1996 Act "plainly contemplate[d] a partnership between the federal and state governments to support universal service." *Qwest I*, 258 F.3d at 1203. *See AT&T*, 268 F.3d at 1298. That is evident in the designation of the ETCs to participate in the federal universal service program under § 214(e), which calls on State commissions and the Commission to share the mandatory duty of designating common carriers to be ETCs.[54] The need for a cooperative federal-state partnership also is expressed in the universal service principles set forth in § 254(b), three of which call for the cooperation of the states.[55]

The federal-state regulatory scheme is equally evident in the post-designation regulation of ETCs under the Act. Section 254 delineates a federal universal service program, *see* 47

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[54] *See supra* notes 52 & 53.

[55] The first is the principle that "[c]onsumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas should have access to telecommunications and information services … that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas." 47 U.S.C. § 254(b)(3). The second is that "[t]here should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service." *Id.* § 254(b)(5). The federal policy goals of "reasonably comparable" rates and "specific, predictable, and sufficient" state universal service mechanisms can only be achieved if the states implement their own universal service programs. *See Qwest I*, 258 F.3d at 1203 (recognizing that the Commission lacks jurisdiction over intrastate service). Finally, the third principle is that "[a]ll providers of telecommunications service should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service." *Id.* § 254(b)(4). The need for cooperative state action to fund universal is recognized in § 254(f), which provides, "Every telecommunications carrier that provides intrastate telecommunications service shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the State to the preservation and advancement of universal service in that State." *Id.* § 254(f).

U.S.C. § 254(c), and a state's authority to create its own universal service program, *see id.* § 254(f). *See also WWC Holding Co., Inc. v. Sopkin*, 488 F.3d 1262, 1277 (10th Cir. 2007). Whereas it mandated that the Commission to establish a federal universal service program, Congress permitted states to adopt their own universal service regulations so long as they are not inconsistent with the Commission's universal service rules. *See* 47 U.S.C. §§ 254(f). *See also id.* § 253(b).

Congress provided that state universal service programs were to operate in addition to, and independent of, the federal program. The dual regulatory scheme called for the Commission to assess interstate service providers to fund the federal program, *see id*. § 254(d), and allowed the states to assess intrastate providers to fund the state programs. *See id*. § 254(f). *See also AT&T,* 373 F.3d at 644. Moreover, § 254(f) provides:

> A State may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms.[56]

Congress could not command states to administer or enforce the federal universal service program. *See Printz v. United States*, 521 U.S. 898, 935 (1997); *New York v. United States.* 505 U.S. 144, 188 (1992). There is no requirement in federal law that a state participate in federal telecommunications regulation under the Act. *See MCI Telecommunications Corp v. Bell Atlantic-Pennsylvania,* 271 F.3d 491, 511 (3rd Cir. 2001). A state's decision to participate must be voluntary otherwise the Act would impermissibly "commandeer" state regulatory agencies under *Printz. See id.,* 271 F.3d at 511 n.5. Therefore, Congress required the Commission to develop mechanisms to induce the states to assist in implementing the federal goals of universal

[56] 47 U.S.C. § 254(f).

service. *See Qwest Communications Internat'l Inc. v. FCC,* 398 F.3d 1222, 1238 (10th Cir. 2005); *Qwest I,* 258 F.3d at 1204. The need for such "state inducements" is central to the dual regulatory scheme established by the 1996 Act. *See Qwest I,* 258 F.3d at 1203.

It is against this rather lengthy regulatory backdrop that we view with some incredulity the Commission's suggestion that it forbear from applying §§ 214(e) and 254(e) since they "restrict universal service support to ETCs."[57] We are also incredulous at the suggestion of Time Warner Cable, Inc. that the Commission exercise its forbearance authority so that ETC status is not a prerequisite for broadband funding eligibility, because of the "systemic biases" in favor of ILECs,[58] and since "broadband Internet access is an information service, it makes no sense to require designation as an eligible *telecommunications* carrier."[59] It suffices to note that § 1 of the Act imposes the duty on the Commission to administer the USF in accordance with the dual federal-state regulatory scheme that Congress codified in §§ 214(e) and 254, and § 10 of the Act cannot relieve the Commission's of its duty.[60] Nor does § 10 apply to allow the Commission to effectively oust the states from the cooperative federal-state partnership formed by Congress.

Under the "cooperative federalism" scheme, Congress is said to have "invited" states to participate as partners in administering programs under the 1996 Act and, to the extent they "voluntarily accepted" the invitation, state commissions become partners in the administration of the programs. *See BellSouth,* 494 F.3d at 448. By accepting the invitation, the state falls subject to the conditions Congress imposed on state regulation. *See MCI,* 271 F.3d at 510-11. Thus,

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[57] *Notice* at 28 (¶72).

[58] Opening Comments and Reply Comments on Section XV of Time Warner Cable, Inc., at 22 (Apr. 18, 2011).

[59] *Id.* at 23.

[60] *See* Cellular South at 25-27.

when they designate common carriers as ETCs, state commissions do so pursuant to the authorization of Congress and state legislatures.

Inasmuch as it lacks the power to enforce § 214(e) against a state commission, the Commission cannot exercise its § 10 authority to prevent state commissions from exercising their authority under § 214(e) to designate common carriers as ETCs.[61] The Commission certainly lacks the authority to prevent state commissions from obeying the mandate that they designate only telecommunications carriers to be eligible to receive USF support. Finally, given the congressional mandate to induce the states to assist in implementing the policies set forth in § 254(b), the Commission cannot be authorized to strip state commissions of their authority to designate ETCs, which is central to their role in the administration of the USF.

CONCLUSION

Defending its classification of cable modem service as an information service before the Supreme Court in 2005, the Commission warned the Court that a parade of horribles would follow if cable modem service was regulated as a telecommunications service and subjected to the "full panoply of Title II requirements."[62] The Court was told:

> Regulating cable modem service as a telecommunications service would dramatically alter the regulatory environment that has fostered … investment and growth. Cable operators would have to restructure their pricing of cable modem service to reflect the fact that the telecommunications component of the service must be separated from its other components and be subject to the full panoply of Title II requirements. Cable operators also would be required to contribute to federal universal service support mechanisms … as well as to other funds that support telephone number portability and telephone relay services for the hearing impaired … and they might have to pay higher pole attachment rates for constructing their networks …. Cable operators could also be obligated to engineer and operate their cable systems to accommodate interconnection

[61] *See* 47 U.S.C. § 214(e)(2).

[62] Brief for the Federal Petitioners at 30, *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005) (Nos. 04-277 and 04-281) ("*Brand X* Brief").

> between their cable systems and the networks of telecommunications carriers … or provide "open" access to cable facilities…. Those heightened regulatory obligations could lead cable operators to raise their prices and postpone or forgo plans to deploy new broadband infrastructure, particularly in rural or other underserved areas.[63]

Now that time has shown that operating in a "minimal regulatory environment"[64] did not prompt cable operators to deploy new broadband infrastructure, the Commission wants to untether the Title II requirements to receive USF support from the "panoply of Title II requirements" that posed such a threat to broadband deployment in 2005. However, neither the Commission nor information service providers can have it both ways. If the information services providers that the Commission favors are to be exempt from all Title II regulations, they cannot be eligible to receive USF support that is available under Title II regulations. If it wants to give information services providers the best of both regulatory worlds, the Commission must ask Congress to overhaul its universal service program. The Commission is powerless to do that on its own.

Respectfully submitted,

Russell D. Lukas
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May 23, 2011

[63] *Brand X* Brief at 31.

[64] *Id.* at 29.

ATTACHMENT 1

PARTIES CONTENDING THAT THE FCC IS WITHOUT AUTHORITY
TO EXTENT USF SUPPORT TO INFORMATION SERVICE PROVIDERS

PARTY	ACT CONSTRUED (PAGES)
Cellular South, Inc.	6-33
USA Coalition	9
Greenlining Institute	—
Regulatory Commission of Alaska	—
NARUC	3-8
National Ass'n of State Utility Consumer Advocates	27-35
NECA, Inc. *et al.*	81-82
COMPTEL	26-30
Rural Telecommunications Carriers Coalition	6-19

PARTIES THAT ARE UNCERTAIN WHETHER THE FCC HAS THE
AUTHORITY TO EXTENT USF SUPPORT TO INFORMATION SERVICE PROVIDERS

PARTY	ACT CONSTRUED (PAGES)
Rural Cellular Ass'n	6-9
Public Utilities Commission of Ohio	4-9

PARTIES CONTENTING THAT THE FCC HAS THE AUTHORITY
TO EXTENT USF SUPPORT TO INFORMATION SERVICE PROVIDERS

PARTY	ACT CONSTRUED (PAGES)
ViaSat, Inc	—
AdHoc Telecommunications Users Committee	—
Information Technology Industry Council	—
Google, Inc.	14-15
American Cable Ass'n	25
AT&T Inc.	111-20
ADTRAN, Inc.	—
Vontage Holdings Corp.	8-9
Time Warner Cable Inc.	21-24
Satellite Broadband Providers	20-21
Telecommunications Industry Ass'n	6-7
Rural Broadband Alliance	—